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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

| | | |
|---|---|---|
| In re: | : | Chapter 11 |
| CIRCUIT CITY STORES, INC., et al., | : | Case No. 08-35653 (KRH) |
| Debtors. | : | Jointly Administered |

**REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO CERTAIN CLAIMS SUBJECT TO (I) THE DEBTORS' NINETEENTH OMNIBUS OBJECTION TO CLAIMS (RECLASSIFICATION OF CERTAIN MISCLASSIFIED CLAIMS TO GENERAL UNSECURED, NON-PRIORITY CLAIMS) AND (II) THE DEBTORS' THIRTY-THIRD OMNIBUS OBJECTION TO CLAIMS (MODIFICATION AND/OR RECLASSIFICATION OF CERTAIN CLAIMS)**

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**NATURE AND STAGE OF PROCEEDINGS**

On December 18, 2009, the Debtors filed the Debtors' Motion for Summary Judgment with Respect to Certain Claims Subject to (I) the Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-priority Claims) and (II) the Debtors' Thirty-Third Omnibus Objection to Claims (Modification and/or Reclassification of Certain Claims) (the "Summary Judgment Motion"; D.I. 6135) and the memorandum of law in support thereof (the "Opening Brief"; D.I. 6136) in which the Debtors argued that the Reclamation Claims (as defined in the Opening Brief) filed by the Reclamation Claimants (as defined in the Opening Brief) should be reclassified as pre-petition general unsecured, non-priority claims.

On January 8 and January 11, 2010, the following Reclamation Claimants (collectively, the "Respondents") filed oppositions to the Summary Judgment Motion: (i) Denon Electronics (USA) LLC and Boston Acoustic, Inc. (the "Denon and Boston Acoustic Opposition"; D.I. 6236); (ii) Paramount Home

Entertainment Inc. (the "Paramount Opposition"; D.I. 6237); (iii) Cisco-Linksys, LLC (the "Cisco Opposition"; D.I. 6243); (iv) Plantronics, Inc. (the "Plantronics Opposition"; D.I. 6244); (v) Seagate Technology, LLC (the "Seagate Opposition"; D.I. 6245); and (vi) Lumisource, Inc. (the "Lumisource Opposition"; D.I. 6246, and, collectively with the prior Oppositions, the "Oppositions").

This is the Debtors' reply brief in support of the Summary Judgment Motion (the "Reply").

## STATEMENT OF MATERIAL FACTS

The Debtors rely upon and incorporate by reference as if fully set forth herein the "Statement of Material Facts" in the Opening Brief. Capitalized terms not otherwise defined herein shall have the meanings ascribed them in the Opening Brief.

## ARGUMENT

### I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THERE ARE NO DISPUTES OF MATERIAL FACT RELEVANT TO THE LEGAL ISSUES PRESENTED IN THE SUMMARY JUDGMENT MOTION AND NO DISCOVERY IS NECESSARY.

In the Opening Brief, the Debtors contend, and the Respondents do not contest, that summary judgment is

appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Opening Brief at 17 (citing In re US Airways, Inc., 2006 WL 2992495, at *4 (E.D. Va. 2006)[1]).[2] Although the Respondents do not dispute the material facts set forth in the Opening Brief, the Respondents contend that summary judgment is not appropriate because additional facts are necessary to resolving the issues.[3]

However, no additional facts are relevant or necessary to resolve the legal issues presented by the Debtors in the Opening Brief.[4] Indeed, at least one

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[1] A true and correct copy of In re US Airways, Inc., 2006 WL 2992495 (E.D. Va. 2006) is included as Exhibit D in the Appendix attached hereto.

[2] See Paramount Opposition at 9; Denon and Boston Acoustic Opposition at 5; see also Seagate Opposition; Plantronics Opposition; Cisco Opposition; LumiSource Opposition.

[3] See Paramount Opposition at 10; Denon and Boston Acoustic Opposition at 5-6; Seagate Opposition at 3-4; Plantronics Opposition at 3-4; Cisco Opposition at 3-4; see also LumiSource Opposition.

[4] Certain of the Respondents argue that additional facts are necessary to enable them to determine whether they may assert administrative expense claims under Bankruptcy Code section 503(b). See Cisco Opposition at 3-4; Plantronics Opposition at 3-4; Seagate Technology Opposition at 3-4. This argument fails because the Respondents cannot satisfy the requirements for asserting an administrative expense under 503(b) as a matter of law. To determine whether a claim qualifies as an administrative *(cont'd)*

Respondent concedes as much. See Paramount Opposition at 10 (stating that "unless this Court agrees with the [] positions taken by the Debtors . . ., the Motion should be denied at this time.").[5] Accordingly, summary judgment is appropriate and proper.

## II. THE RESPONDENTS RECLAMATION CLAIMS ARE GENERAL UNSECURED, NON-PRIORITY CLAIMS AS A MATTER OF LAW.

In the Opening Brief, the Debtors assert that under the plain language of Bankruptcy Code section 546(c), as amended by BAPCPA, reclamation claims are general unsecured, non-priority claims. In opposition, the Respondents argue that the Debtors are misinterpreting section 546(c) and the BAPCPA amendments

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expense, the Fourth Circuit has established a two-part test: "(1) the claim must arise out of a post-petition transaction between the creditor and the debtor-in-possession (or trustee) and (2) the consideration supporting the claimant's right to payment must be supplied to and beneficial to the debtor-in-possession in the operation of the business." Devan v. Simon DeBartolo Group, L.P. (In re Merry-Go-Round Enters., Inc.), 180 F.3d 149, 157 (4th Cir. 1999). Here, the first requirement plainly cannot be satisfied. By virtue of seeking reclamation claims under section 546(c), Respondents assert that the Reclamation Claims are for goods received by the Debtors during the 45 days prior to the Petition Date. See 11 U.S.C. § 546(c)(1) (allowing reclamation of goods only where "the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title" (emphasis added)). Accordingly, any transaction between the Debtors and the Respondents clearly occurred pre-petition.

[5] See also Seagate Opposition; Plantronics Opposition; Cisco Opposition; LumiSource Opposition.

to that section. The Respondents' arguments fail for the reasons set forth below.

**A. Respondents' Statutory Interpretation Is Contrary To Relevant Case Law And Devoid Of Any Statutory Or Other Support.**

As set forth in the Opening Brief, section 546(c) was amended to no longer expressly provide that a court may grant a claimant an administrative claim or a junior lien in lieu of preventing the claimant from reclaiming its goods. Opening Brief at 19-23 (citing, among other authority, In re First Magnus Fin. Corp., 2008 WL 5046596 at *2 (Bankr. D. Ariz. 2008)[6] (noting that section "does not give such a [reclamation] seller/creditor an administrative claim . . . ."). This, the respondents cannot deny. The Respondents contend, however, that because other amendments to the Bankruptcy Code "evidence an intent to broaden the rights of trade creditors," the court still has the power to grant reclamation claimants such relief.[7] That implied power

[6] A true and correct copy of In re First Magnus Fin. Corp., 2008 WL 5046596 (Bankr. D. Ariz. 2008) is included as Exhibit E in the Appendix attached hereto.

[7] Paramount Opposition at 12 (citing A. Resnick, The Future Of Chapter 11: A Symposium Cosponsored by the American College of Bankruptcy: The Future of the Doctrine of Necessity and Critical- *(cont'd)*

of the bankruptcy court and the foundation that Respondents provide for it simply do not exist.

Specifically, to support their argument, the Respondents point neither to the statute nor case law interpreting it, but instead content that the Supreme Court's holdings in Dewsnup v. Timm, 502 U.S. 410 (1992), and Keene Corp. v. U.S., 508 U.S. 200 (1993).[8] Neither case, however, supports the Respondents' position.

In Dewsnup, the court rejected the debtor's interpretation of the phrase "allowed secured claim" in Bankruptcy Code section 506(d) because the phrase was ambiguous. See Dewsnup, 502 U.S. at 417. In so doing, the Supreme Court reasoned that "given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule . . . ." Id. The BAPCPA amendments, however, are not ambiguous on their face; and nowhere do they provide the Court with the authority

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Vendor Payments in Chapter 11 Cases, 47 B.C. L. Rev 183, 208 (2005)); see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

[8] See Paramount Opposition at 13-14; see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

to grant a reclamation claimant either an administrative or a secured claim. Therefore, Dewsnup is simply distinguishable.

More importantly, Congress deleted the entire section authorizing the bankruptcy court to grant reclamation claimants an administrative or secured claim in lieu of permitting them to reclaim their goods. Thus, there is no ambiguous phrase to interpret as there was in Dewsnup, and the Court's inquiry should conclude. CSX Transp., Inc. v. Georgia State Bd. of Equalization, 552 U.S. 9, 20 (2007) (stating that where "the words of the statute are unambiguous, the judicial inquiry is complete." (quotation and citation omitted)).

Similarly, the Respondents reliance on Keene is misplaced. In Keene, Congress had amended 28 U.S.C. § 1500 to replace the words "file or prosecute" with the word "jurisdiction". This change, however, was described in the legislative history as a "change in phraseology." Keene, 508 U.S. at 209. Thus, against this backdrop, the Supreme Court again refused to depart from pre-amendment practice absent a clearly expressed intent to do so. Id.

Additionally, the Respondents' reliance on Dewsnup and Keene is also misplaced because it ignores the fact that when words are deleted from a statute, the Court "must presume that Congress intended what it said when it . . . delete[d]" the words. U.S. Trustee v. Equip. Servs. (In Re Equip. Servs.), 290 F.3d 739, 745 (4th Cir. Va. 2002) (holding that when Congress deleted the phrase "debtor's attorney" from the list of persons who could be compensated under Bankruptcy Code section 330, Congress must have meant to exclude debtors' attorneys from receiving compensation under that section). Indeed, the Supreme Court reached the same conclusion in Lamie v. United States Trustee, holding that by deleting a reference to "debtor's attorney" in section 330(a), the Bankruptcy Code no longer provided for compensation to a "debtor's attorney". Lamie v. United States Trustee, 540 U.S. 526, 534 (2003) (reasoning that "[w]e should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history").

Finally, as certain Respondents concede, the legislative history sheds no light on the issue presented to the Court. See Paramount Objection at 11.[9] If it did, however, it actually supports the Debtors' interpretation. In particular, the Debtors' interpret the BAPCPA amendments to have eliminated the Court's ability to deny a reclamation claimant's rights to take back goods. In so doing, Congress eliminated a bar to trade creditors enforcing their state law reclamation rights.[10] Consequently, even assuming that the BAPCPA amendments rendered section 546 ambiguous, the Debtors' interpretation reflects a broadening of trade creditors' rights to reclaim goods as permitted by state law.

Thus, there is no basis to depart from the plain meaning of section 546(c), which provides neither an express nor implied basis for granting reclamation claimants an administrative claim or junior lien.

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[9] See also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

[10] The BAPCPA amendments also broadened trade creditor rights by expanding the reclamation look back perod to 45 days and providing potential reclamation claimants with the alternative remedy of asserting an administrative expense under section 503(b)(9).

Moreover, even if there were, the legislative history supports the Debtors' interpretation. Accordingly, the Respondents' statutory interpretation argument should be rejected and summary judgment granted.

**B. Respondents' Reliance On Pre-BAPCPA Cases Is Misplaced.**

Unable to cite any post-BAPCPA cases, the Respondents rely heavily on certain pre-BAPCPA cases -- mainly, Phar-Mor v. McKesson Corp. (In re Phar-Mor, Inc.), 534 F.3d 502 (6th Cir. 2008) and In re Georgetown Steel Co., 318 B.R. 340 (Bankr. D.S.C. 2004). As discussed in the Opening Brief, these cases are irrelevant because the courts were interpreting the pre-BAPCPA version of section 546(c). Opening Brief at 20-23.

Indeed, Phar-Mor stands only for the narrow proposition that, under pre-BAPCPA section 546(c) and Ohio law, a valid reclamation creditor whose reclamation request is denied by the Court must be granted an administrative expense or given a lien. Phar-Mor, 534 F.3d at 504-505. Neither pre-BAPCPA section 546(c) nor Ohio law is relevant here. Moreover, as set forth in

the Opening Brief and further demonstrated below, this Court never denied the Respondents' Reclamation Demands.

Georgetown Steel is also irrelevant. In Georgetown Steel, the court was concerned with the interpretation and application of the pre-BAPCPA section 546(c) and South Carolina law. Georgetown Steel, 318 B.R. 340. Again, neither is applicable here.

Similarly, each additional case cited by Respondents concerns pre-BAPCPA section 546(c)(2) and provides no support for the proposition that the remedies of an administrative expense or junior lien exist under the current version of the statute. See Pester Refining Co. v. Ethyl Corp. (In re Pester Refining Co.), 964 F.2d 842, 847 (8th Cir. 1992) (finding that reclamation creditor was entitled to administrative expense priority under pre-BAPCPA section 546(c)(2)); In re Hartz Foods, Inc., 264 B.R. 33, 37 (Bankr. D. Minn. 2001) (same); In re Sunstate Dairy & Food Prods. Co., 145 B.R. 341, 345-46 (Bankr. M.D. Fla. 1992) (same).

As also demonstrated in the Opening Brief, even assuming that the pre-BAPCPA cases were relevant,

the Respondents are still not entitled to an administrative claim or a junior lien because this Court never denied their Reclamation Demands. Opening Brief at 23-25. Nor does the Respondents' contention that the provisions of Reclamation Procedures Order constituted a denial of the Reclamation Claims have any basis in fact.[11] As such, Paramount's statement that "it appears [the Debtors] have used this Court to mislead the numerous reclamation claimants in these cases." Paramount Opposition at 15 (emphasis added)[12] is entirely inappropriate given the record in these cases and cited in the Opening Brief.

The Reclamation Procedures Order plainly and unambiguously provides that the Court was not denying any reclamation demand, stating that:

> Nothing in this Order or the above procedures is intended to prohibit, hinder, or delay any Reclamation Claimant from asserting or prosecuting any of its rights to seek to reclaim goods provided to the Debtors, or affect, alter,

[11] See Paramount Opposition at 15; see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

[12] See also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

> diminish, extinguish, or expand the rights or interest, if any, to recover goods (or proceeds thereof) sought to be reclaimed.

Reclamation Procedures Order at ¶ 6.[13] Moreover, the Reclamation Procedures Order expressly provides that "[a]bsent receipt of any notice setting forth such an Allowed Reclamation Amount, the Debtors [not the Court] shall be deemed to have rejected the Reclamation Demand." Reclamation Procedures Order at ¶ 5(c). (emphasis added). These two provisions, read together, lead to only one conclusion -- whether or not the Debtors rejected a reclamation demand, the creditor was free to seek to reclaim goods (before or after such rejection) and the Court was neither denying nor "prohibit[ing], hinder[ing], or delay[ing]" any such reclamation right. See Reclamation Procedures Order at ¶¶ 5(c), 6.[14]

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[13] A true and correct copy of the Reclamation Procedures Order is included in the Appendix attached hereto at Exhibit A.

[14] In that regard, the Reclamation Procedures Order stands in stark contrast to reclamation orders entered prior to the BAPCPA amendments in which such an injunction or stay was imposed. See, e.g., In re US Airways Group, Inc., Case No. 04-13189 (SMS) (Bankr. E.D. Va. Sep. 14, 2004)(prohibiting creditors from pursuing their reclamation rights, other than under the court approved procedures); In re US Airways Group, Inc., Case No. 02- *(cont'd)*

Furthermore, to emphasize the changes and make this point crystal clear, at the first and second day hearings in these cases, Debtors' counsel made statements on the record reinforcing the fact that, notwithstanding the entry of the Reclamation Procedures Order, creditors were free to pursue their reclamation rights. See Transcript of Hearing on November 10, 2008 at 84 (Debtors' counsel stating that if reclamation claimants wanted "to get [a] TRO and injunction in an adversary proceeding, . . . [the proposed Reclamation Procedures Order] doesn't preclude them from doing it")[15]; Transcript of Hearing held December 5, 2008 at p. 62-63 (D.I. 942)(Debtors' counsel stating that if reclamation

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83984 (SMS) (Bankr. E.D. Va. Aug. 12, 2002)(staying all adversary proceedings relating to reclamation claims); In re Fas Mart Convenience Stores, Inc., Case No. 01-60386 (Bankr. E.D. Va. Aug. 14, 2001) (prohibiting reclamation claimants from "taking steps to establish the validity and amount of their Reclamation Claims, including the commencement and continued prosecution of adversary proceedings" and staying any efforts to do so); In re Heilig-Meyers Company, Case Nos. 00-34533 to 00-34358(DOT) (Bankr. E.D. Va. Jan. 11, 2001) (same); see also Georgetown Steel, 318 B.R. at 343 (noting that the reclamation procedures order provided that "the Reclamation Creditors were enjoined from seeking to reclaim, or interfering with the delivery of goods to or by Debtor"). The above-referenced orders are included as Exhibits G through J in the Appendix attached hereto.

[15] A true and correct copy of the Transcript of Hearing on November 10, 2008 is included as Exhibit B in the Appendix attached hereto.

claimants were not "comfortable with these procedures, then . . . [such claimants were] entitled to file a lawsuit, a request for a stay, [or] a temporary injunction").[16]

Thus, not only are the pre-BAPCPA cases cited by the Respondents not applicable, but also the Respondents' suggestions that the Debtors acted inappropriately and the Court denied the Reclamation Demands are baseless.

### C. The Respondents Were Required, But Failed, To Take The Necessary Steps To Preserve Their Reclamation Rights Under State And Federal Law.

In the Opening Brief, the Debtors further established that, even if the Court determined that the Respondents may be granted an administrative expense or junior lien, they were not entitled to that remedy because they had not pursued their Reclamation Claims on a timely basis and with sufficient diligence. Opening Brief at 26. As expected, the Respondents contend

[16] A true and correct copy of the Transcript of Hearing on December 5, 2008 is included as Exhibit C in the Appendix attached hereto.

otherwise,[17] but rely on outdated authority that has long since been rejected. See Paramount Opposition at 17 (citing In re Griffin Retreading Co., 795 F.2d 676, 679-80 (8th Cir. 1986); Hartz Foods, 264 B.R. at 36 (following Griffin as binding precedent in the Eighth Circuit); and In re Flagstaff Foodservice Corp., 32 B.R. 820, 823 (Bankr. S.D.N.Y. 1983)).

Overwhelmingly, courts have rejected Griffin and similar cases and, instead, concluded that a creditor seeking to reclaim goods must do more than submit a written demand. See First Magnus, 2008 WL 5046596 at *1-2 (noting that a creditor can lose its reclamation rights by not pursuing its reclamation claim timely and diligently); In re McLouth Steel Prods. Corp., 213 B.R. 978, 987 (Bankr. E.D. Mich. 1997) (finding that the "burden is on the reclamation claimant to further diligently pursue its claim by, for example, filing a motion or complaint for reclamation in bankruptcy court for the goods, or commencing an adversary proceeding");

[17] See Paramount Opposition at 16; Denon and Boston Acoustic Opposition at 3, n. 2; see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

Tate Cheese Co. v. Crofton & Sons, Inc. (In re Crofton & Sons, Inc.), 139 B.R. 567, 569 (Bankr. M.D. Fla. 1992) (holding that a creditor's failure to diligently pursue its reclamation demand through appropriate judicial channels defeated its right to reclaim goods); Sunstate Dairy, 145 B.R. at 344 (holding that to demonstrate a right of reclamation, creditor must show "diligent assertion of the right of reclamation").[18]

As discussed in the Opening Brief, under these decisions, the Respondents' actions were legally inadequate. Opening Brief at 27-29.

Certain of the Respondents further assert that, because they complied with the terms of the Reclamation Procedures Order, which allegedly "go beyond the statutory requirements for establishing the right to reclaim," they were not required to take additional

[18] See also In re Adventist Living Ctrs., Inc., 52 F.3d 159, 165 (7th Cir. 1995) (denying administrative claim where debtor disregarded agreement with reclamation claimant to segregate goods and grant administrative claim for value because the reclamation claimant should have acted sooner to enforce its rights); In re Waccamaw's HomePlace, 298 B.R. 233, 238-39 (Bankr. D. Del. 2003) (denying administrative claim to reclamation claimant where, "after making its Reclamation Demand [reclamation claimant] inexplicably took no action to protect or enforce its rights with respect to the Reclamation Goods," and finding that it was "incumbent on [reclamation claimant] to exercise self help or seek judicial intervention").

steps.[19] This argument fails because the Reclamation Procedures Order only required the Respondents to comply with applicable law.[20]

Under applicable law, a creditor seeking to reclaim goods must submit a written demand that includes specific information within the time period specified in section 546(c). See 11 U.S.C. § 546(c). Here, the Reclamation Procedures Order merely required that the creditor comply with section 546(c) in that the creditor must (i) send a written reclamation demand so that it is received by the debtors "no later than the date that is twenty (20) days following the Petition Date or such earlier time as may be required under Bankruptcy Code section 546(c)[,]" and (ii) such demand must include

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[19] See Paramount Opposition at 17-18; see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

[20] Paragraph 5(b) of the Reclamation Procedures Order also asked a reclamation creditor to include a statement whether the creditor intended to file a claim under section 503(b)(9) and, if available, in what amount. This requirement could be completed by including an additional sentence in a reclamation demand. Such requirement, however, hardly justifies the Respondents failure to diligently pursue their rights, as certain Respondents suggest. See Paramount Opposition at 17-18; see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

information required by section 546(c). Reclamation Procedures Order at ¶ 5(a),(b).

The mere fact that this Court required the Respondents to comply with one aspect of applicable law does not excuse the Respondents' failure to comply with other aspects of applicable law, i.e., diligently pursuing their rights. See, e.g., Sunstate Dairy, 145 B.R. at 344 (listing "diligent assertion of the right of reclamation" as a necessary component of a valid reclamation right).

Accordingly, the Respondents were required to diligently pursue their Reclamation Claims and their failure to do so warrants denial of their Reclamation Claims as a matter of law.[21]

[21] Certain of the Respondents further argue that Debtors' interpretation of section 546(c) would foreclose Respondents' rights to assert and prove other claims arising out of the Alleged Goods. Denon and Boston Acoustic Opposition at 4-5. see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition. It is unclear on what grounds Respondents believe they would be precluded from asserting any other claims they may have, whether administrative or general unsecured. Moreover, this is clearly not the case because, as noted above, the Respondents were completely free to pursue their right to actually reclaim the goods. Moreover, to the extent they were unsuccessful, they have pre-petition unsecured claim. Indeed, as certain Respondents have alleged, "[reclamation] takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as *(cont'd)*

## III. THE RECLAMATION CLAIMS ARE NOT ENTITLED TO PRIORITY BECAUSE THE PRE-PETITION AND DIP LENDERS HAD PRIOR LIENS OVER THE DEBTORS' INVENTORY.

### A. The Debtors Are Entitled To Summary Judgment Based On The Prior Lien Defense.

In the Opening Brief, the Debtors assert that the inclusion in post-BAPCPA section 546(c) of language providing that reclamation rights are "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof" renders the Respondents' Reclamation Claims subject to the prior liens of the Pre-Petition Lenders and the DIP Lenders, such that the Reclamation Claims are valueless as anything other than general unsecured, non-priority claims. Opening Brief at 29-36. In support, the Debtors rely on In re Dana in which the Court held, on nearly identical facts, that the prior lien defense included in post-BAPCPA section

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against the particular seller." Denon and Boston Acoustic Opposition at 4 (quoting official comment to Va. Code Ann. § 8.2-702 (2009)). Any such alleged misrepresentation, however, occurred pre-petition and, thus, the Respondents would have a pre-petition general unsecured claim that cannot exceed the amount of the value of the goods that the Respondent was unable to reclaim. See Grady v. A.H. Robins Co., 839 F.2d 198, 201-02 (4th Cir. 1988)(adopting the conduct test for determining when claims arise).

546(c) rendered the reclamation claims valueless. In re Dana Corp., 367 B.R. 409, 421 (Bankr. S.D.N.Y. 2007).

In opposition, certain Respondents dispute this legal conclusion and assert that discovery is required to ascertain certain additional facts.[22] If the Court follows the bankruptcy court's decision in Dana, however, no discovery is necessary, and critically, none of the Respondents have attempted to distinguish (or for that matter substantively discuss) Dana. Instead, they rely on the pre-BAPCPA decisions of Phar-Mor and Georgetown Steel. The Debtors submit that Dana is directly on point, consistent with current post-BAPCPA law, and well reasoned and, therefore, submit that the Reclamation Claims are valueless because the prior lien defense applies.

**B. Reclamation Is An In Rem Remedy That Does Not Provide Reclamation Claimants With A Right To Proceeds.**

In the Opening Brief, the Debtors further argue that Respondents have no right to the proceeds

[22] See Paramount Opposition at 20-22; Denon and Boston Acoustic Opposition at 5-6; see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

from the sale of the Alleged Goods. The Respondents disagree, arguing that if the Alleged Goods were sold they are entitled to the proceeds.[23] The Respondents' argument ignores the fact that, overwhelmingly, courts have concluded that reclamation is an in rem remedy.

It is well established that there is no federal right to reclamation. Hartz Foods, 264 B.R. at 35-36 ("Section 546(c) does not create any right to reclamation . . ."); see also Dana, 367 B.R. at 418 (holding that BAPCPA did not create a new federal right of reclamation). Instead, reclamation rights are created by state law and section 546(c) sets out the scope of any such reclamation rights in bankruptcy. Hartz Foods, 264 B.R. at 35-36.

Most states' laws represent a codification of Uniform Commercial Code section 2-702. Dana, 367 B.R. at 414. That section provides that "[w]here the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand

[23] See Paramount Opposition at 20-24; see also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

made within ten days after the receipt . . .” UCC § 2-702 (emphasis added). Thus, the only remedy provided under the plain language of the Uniform Commercial Code is a right to reclaim the goods at issue.

As such, the majority of courts have recognized that the right of reclamation, as provided by state law and made applicable in bankruptcy by section 546(c), provides only an in rem right to reclaim goods. See, e.g., Dana, 367 B.R. at 419 (noting that reclamation is an in rem remedy); In re Pluma, Inc., 2000 WL 33673751, at *3 (Bankr. M.D.N.C. 2000)[24] (same); Crofton & Sons, 139 B.R. at 569 (same); Action Indus., Inc. v. Dixie Enters., Inc., 22 B.R. 855, 859 (Bankr. S.D. Ohio 1982) (same).

Consequently, the Respondents are not entitled to the proceeds from the Alleged Goods or any other property of the Debtors.

[24] A true and correct copy of In re Pluma, Inc., 2000 WL 33673751 (Bankr. M.D.N.C. 2000) is included as Exhibit F in the Appendix attached hereto.

**C. The Respondents Cannot Invoke The Doctrine Of Marshaling To Force The Pre-Petition Lenders Or The DIP Lenders To Satisfy Their Liens From the Alleged Goods Or Proceeds Thereof Last.**

Finally, certain of the Respondents argue that marshaling "may turn out to be very relevant in these cases," Paramount Opposition at 23, or, more strongly, that the Court should apply the doctrine of marshaling. Lumisource Objection at 2. Despite Respondents' assertions, the overwhelming majority of courts have held that marshaling may not be invoked by an unsecured creditor, such as a reclamation creditor. See, e.g., Simon & Schuster, Inc. v. Advanced Mktg. Servs. (In re Advanced Mktg. Servs.), 360 B.R. 421, 427 (Bankr. D. Del. 2007) (holding that reclamation creditors are "unsecured creditors [who] cannot invoke the equitable doctrine of marshaling"); Dana, 367 B.R. at 419 (stating that "[r]eclamation is an in rem remedy, and reclaiming sellers have no right to compel a lienholder to satisfy its claim from other collateral"); In re Gibson Group, Inc., 151 B.R. 133, 134-35 (Bankr. S.D. Ohio 1993) (noting that the "majority rule ... denies unsecured creditors standing to invoke the doctrine of

marshaling"); In re Mel-O-Gold, Inc., 88 B.R. 205, 207 (Bankr. S.D. Iowa 1988) (stating that, "[t]raditionally, marshaling has been used by secured creditors and has not been available to unsecured creditors").

Nor are the cases cited by Respondents contrary to this authority. For example, in Quality Stores, although the court stated that "a subordinate reclaiming seller might seek to compel a superior secured creditor to marshal and satisfy its secured claim from assets other than the goods delivered by the subordinate reclaiming seller," the court was interpreting pre-BAPCPA section 546(c)(2), which authorized a junior lien and thereby converted a general unsecured creditor to a junior secured creditor. Q In re Quality Stores, Inc., 289 B.R. 324, 335-36 (Bankr. W.D. Mich. 2003). In such circumstances, marshalling may very well be appropriate. See In re Arlco, 239 B.R. 261, 274-75 (Bankr. S.D.N.Y. 1999) (noting that "a junior secured creditor may seek to compel a senior secured creditor to marshal assets").[25]

[25] In Suwannee Swifty Stores, another case cited by the Respondents, the court merely noted the possibility of marshaling in favor of *(cont'd)*

Similarly, reverse marshaling is at issue here because, once again, marshaling can only be invoked by junior secured creditors. The case cited by Paramount, In re Center Wholesale, concerns rights as between junior and senior secured creditors and has no application here. Paramount Opposition at 25 (citing In re Center Wholesale, Inc., 788 F.2d 541 (9th Cir. 1986)).[26]

Accordingly, there is no basis to suggest that the Pre-Petition Lenders or the DIP Lenders could have been forced to satisfy their liens from the Alleged Goods last.

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an unsecured creditor in dicta, but went on to find it irrelevant to the case. In re Suwannee Swifty Stores, Inc., 2000 Bankr. LEXIS 2005, *10 (Bankr. M.D. Ga. March 22, 2000).

[26] See also Cisco Opposition; Plantronics Opposition; Seagate Technology Opposition; LumiSource Opposition.

**CONCLUSION**

For the foregoing reasons and the reasons set forth in the Opening Brief, the Summary Judgment Motion should be granted.

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